UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

S & L VITAMINS, INC., S & L, - vs. - AUSTRALIAN GOLD, INC., Defendant.	CIVIL ACTION NO. 05-CV-1217 (JS) (MLO)
AUSTRALIAN GOLD, INC., Third Party S & L, - vs. - LARRY SAGARIN DEP. AND JOHN DOES 1-10, Third Party Defendants.	**PLAINTIFF'S AND THIRD PARTY DEFENDANT LARRY SAGARIN'S RESPONSE TO AUSTRALIAN GOLD'S STATEMENT PURSUANT TO LOCAL RULE 56.1**

Plaintiff S & L Vitamins and Third-Party Defendant Larry Sagarin, by and through their undersigned attorneys and pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule 56.1, submit the following response in opposition to Australian Gold's motion for summary judgment

Australian Gold's Proposed Undisputed Facts

1. Undisputed.
2. Undisputed.
3. Undisputed.
4. Undisputed.
5. Undisputed.
6. Undisputed.
7. Undisputed.

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8. Undisputed save as to the characterization of the artwork as "original and distinctive," which is a matter of opinion or a mixed fact-law determination.

9. Disputed: See Plaintiff's Rule 56.1 Statement at ¶¶ 62, 64, 65, 66, 68, 70, 74.

10. Undisputed.

11. Undisputed.

12. Undisputed.

13. Disputed: See Plaintiff's Rule 56.1 Statement at ¶¶ 56, 57, 62, 64, 65, 66, 68, 70, 74, 78

14. Undisputed.

15. Undisputed.

16. Undisputed.

17. Undisputed.

18. Undisputed.

19. Undisputed.

20. Undisputed except as to the term "ensure," on the grounds that despite its efforts *vel non*, Australian Gold does not successfully "ensure" the result claimed: See Plaintiff's Rule 56.1 Statement at ¶¶ 44, 64, 68.

21. Undisputed.

22. Undisputed.

23. Undisputed.

24. Undisputed that Australian Gold "takes steps to . . . police[] the sale of its products on the Internet" but disputed as to the claim that it does so for the sole purpose, as implied, of maintaining the "reputation and integrity of its tanning products": See Plaintiff's Rule 56.1 Statement at ¶¶ 9, 29, 30, 35, 44.

25. Undisputed.

26. Undisputed.

27. Undisputed.

28. Undisputed.

29. Undisputed.

30. Undisputed.

31. Undisputed.

32. Undisputed.

33. Disputed on the ground that the term “Authorized Dealer of Australian Gold’s tanning product” is not a fact but is a legal characterization of issues at the heart of this case, because there is no contractual or other legal definition of an “Authorized Dealer” that binds, limits or in any other way applies to plaintiff.

34. Undisputed.

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62. Undisputed.

63. Disputed: The deposition testimony referred to in ¶ 63 does not support the supposed fact of consumer confusion. See also Plaintiff's Rule 56.1 Statement at ¶ 30.

64. Disputed on the ground that the phrase "authorized to sell such products" and the phrase "Australian Gold prohibits the sale" are not facts but are legal characterizations of issues at the heart of this case, because there are no contractual or other legal definition of "authority" or "prohibition" that bind, limit or in any other way apply to plaintiff.

65. Disputed on the grounds that the document referred to does not purport to "authorize" anything other than parties to whom Australian Gold distributors may sell Australian Gold merchandise: See Plaintiff's Rule 56.1 Statement at ¶ 45.

66. Disputed on the ground that the phrase "explicitly prohibited from receiving" is not a fact but is a legal characterization of issues at the heart

of this case, because there are no contractual or other legal definition of "prohibited" that bind, limit or in any other way apply to plaintiff.

67. Disputed: The deposition testimony referred to in ¶ 67 does not support the supposed facts of damage to reputation and goodwill in the Australian Gold trademarks. See also Plaintiff's Rule 56.1 Statement at ¶ 30.

68. Disputed: The deposition testimony referred to in ¶ 68 does not support the supposed facts of damage to reputation and goodwill in the Australian Gold trademarks. See also Plaintiff's Rule 56.1 Statement at ¶ 30.

69. Undisputed.

70. Undisputed.

71. Undisputed.

By: ______________________

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